IN THE MATTER OF a Board of Inquiry appointed pursuant to the Human Rights Code, 1981, S.O. 1981,c. 53 as amended;

AND IN THE MATTER OF the complaint of Shirley Morrison dated September 22, 1987, alleging discrimination in accommodation on the basis of race, colour, place of origin and harassment by Effort Trust Realty Company, and Romeo Aucoin

Before: Katherine Tomaszewski

Appearances:

Jennifer Scott, on behalf of the Ontario Human Rights Commission

Stephen McAurther, on behalf of the Respondent, Effort Trust Realty Company

I. Introduction

This proceeding is an inquiry under the Ontario Human Rights Code arising from a Complaint made by Ms. Shirley Morrison alleging discrimination and harassment in accommodation because of race, colour and place of origin, against The Effort Trust Company, and Mr. Romeo Aucoin. I was advised at the hearing that the parties had agreed not to proceed against Mr. Tony Verrecchia as a Respondent. The Complaint is dated September 22, 1987. I was appointed to sit as a Board of Inquiry to hear this Complaint by the Honourable Elaine Ziemba, by letter dated May 8, 1992. The hearing commenced by way of conference calls on May 26, 1992 and June 5, 1992, at which point hearing dates were set for January 25, 26, 27, 1993. These dates were chosen because on June 5, 1992 I was advised that the personal respondent, Mr. Romeo Aucoin, had suffered a heart attack and had been advised by his doctor to avoid stressful situations for at least six months. In addition to this, I was advised at that point that Mr. Aucoin would be out of the province until the end of December, 1992.

Before the hearing could recommence, I was advised that the matter had been settled, and the January hearing dates were cancelled. Time passed and I was advised that in fact a settlement had not been concluded, and further hearing dates were needed. The hearing resumed by conference call on March 19, 1993 when further hearing dates were set for June 14 to 18, 1993. Mr. Aucoin's daughter, Ms. Wedge, wrote to the Boards of Inquiry Office and to myself in June, requesting that the Complaint be dismissed against Mr. Aucoin, for health reasons. On June 14, 1993 it became apparent that Mr. Aucoin was out of the province and would not be attending the hearing. During the course of the hearing in June, contact was made with Mrs. Aucoin, who indicated that she and her husband were planning to return to Ontario in September. Accordingly, hearing dates were set for September 9 and 10, 1993, at which time it was expected that Mr. Aucoin would give his testimony.

Most unfortunately, Mr. Aucoin passed away suddenly on July 2, 1993. On behalf of everyone involved in this hearing, I would like to express our sympathy and condolences to the Aucoin family.

By letter dated July 27, 1993, Ms. Wedge requested that the Complaint be dismissed against her late father. I advised Ms. Wedge by conference call on September 1, 1993 that I was prepared to entertain her motion for dismissal on September 9 and 10, 1993. I also strongly recommended to her that she (or more properly, her father's estate) be represented by legal counsel at the hearing. For health reasons, I was forced to cancel the

September hearing dates, and the hearing resumed and concluded on October 26, 1993. Ms. Wedge did not appear to argue the motion for dismissal, nor was she represented by legal counsel. Ms. Scott, counsel for the Human Rights Commission supplied me with caselaw in support of the position that the hearing should proceed against Mr. Aucoin, in spite of his death. This brings me to two preliminary matters which must be addressed before I deal with the substance of this case.

II. Preliminary Matters

a) The motion to dismiss the Complaint against Mr. Romeo Aucoin

As I understand the submissions made by Ms. Wedge during the September 1, 1993 conference call, the grounds for the motion to dismiss are as follows:

First, it is unfair to proceed against a man who has not had and will not have an opportunity to give his testimony and defend himself against the allegations made in the Complaint.

Second, it is unfair and inappropriate to proceed against someone who has died.

Third, the allegations made in the Complaint are false and ridiculous.

I shall address these grounds in reverse order. The question of whether the allegations made in the Complaint are "false and ridiculous" or not goes to the very heart of what is to be determined as a result of hearing the testimony which was given during the hearing. I have been satisfied that, on the balance of probabilities, there is at least circumstantial evidence that Ms. Morrison suffered an infringement of her rights under the Human Rights Code during her tenancy in the building of which Mr. Aucoin was the superintendent at the relevant time. The information offered by Ms. Wedge in her letter of July 17, 1993 is not of the nature which would bring the credibility of any of the witnesses into question. In any event, Ms. Wedge did not appear before the Board, and thus did not put any of this information into evidence.

The question of whether it is unfair and inappropriate to proceed against someone who has died was addressed by counsel for the Commission. Section 38(2) of the Trustee Act R.S.O. 1990, c. T.23 provides that:

> Except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of his or her person or to another person's property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong.

Counsel for the Commission, Ms. Scott, provided me with three cases where a Complainant had died before commencement of the hearing. Neither counsel could provide me with a case where the Respondent had died before giving testimony at the hearing. In any event, the Trustee Act was held to apply to the Human Rights Code in two recent decisions, both of which also considered Ontario Human Rights Commission (on behalf of Carolyn Maddox) v. Vogue Shoes and George Goldford (1991), 14 C.H.R.R. D/425. In Baptiste v. Napanee and District Rod & Gun Club (1993) unreported (Ont. Bd. Inq.) (Omatsu), the Board stated after considering s. 38(1) of the Trustee Act that:

> "A complaint pursuant to the Human Rights Code serves not only the private interests of individuals in being free from unlawful discrimination, but also the public interest."

In Barber v. Sears Canada Inc. (1993) unreported (Ont. Bd. Inq.) (Bassford) (interim decision), the Board stated:

> The object of the Trustee Act was to correct the fact that under the common law litigation did not survive the death of the litigants. This applies even more to human rights cases than to tort actions, because in these cases the Commission and the public are affected. In a case of wrongful dismissal the estate could sue for back wages. But on the argument presented, if the person had filed a human rights complaint, then on death all rights would be lost. The framers of the Code could not have intended this absurdity.

Third, as the Preamble to the Code shows there are more than individual rights involved in human rights cases; there are public interests as well. This was also one of the reasons why the Commission is given carriage of complaints....

> ....Accordingly, the board is free to find that the Trustee Act does apply to the Code.

I am persuaded by the reasoning in these decisions that the Trustee Act should apply to the Code. The logic is equally compelling, whether it is a Complainant or a Respondent who has died. As a result, the death of Mr. Aucoin by itself is not sufficient to dismiss the Complaint against him.

The ground which has caused this board the greatest concern, is the first one, that because of his death, Mr. Aucoin did not have the opportunity to give testimony and defend himself against the allegations made against him in the Complaint. This board deeply regrets that it did not have the opportunity to hear Mr. Aucoin's "side of the story". With the agreement of counsel, records of a 'Personal Interview' (Ex. #33), and a telephone

conversation (Ex. #34) between Mr. Aucoin and an investigating officer, Mr. Gary Speranzini, were entered into the record. In the 'Personal Interview', Mr. Speranzini questioned Mr. Aucoin about the specific allegations made against him in the Complaint. Although this does not constitute the full defence which Mr. Aucoin could have made had he been able to appear at the hearing, the record does at least contain Mr. Aucoin's response to the issues raised in the Complaint. This alleviates some fairness concerns.

Mr. Aucoin denied that any of his actions were such as to constitute an infringement of Ms. Morrison's rights under the Code. Nevertheless, he described various events and relationships in such a way as to corroborate Ms. Morrison's testimony that these events took place, although Mr. Aucoin and Ms. Morrison differed as the exact language used, or the interpretation which could be placed on these events. On the whole, I found Ms. Morrison to be a credible witness, and her evidence was corroborated on different points by three other witnesses. In light of these factors, and because the public has a great interest in how superintendents of apartment buildings conduct their duties with respect to the standards of conduct set out in the Human Rights Code, this board declines to dismiss the Complaint against Romeo Aucoin.

b) The Motion to dismiss the Complaint against the Effort Trust Company

At the opening of argument on June 14, 1993, counsel for the respondent Effort Trust made a preliminary motion to dismiss the Complaint against Effort Trust on the grounds of delay and prejudice. Counsel relied on the length of time which had elapsed between the filing of the Complaint and the hearing (5 1/2 years), the absence of Mr. Aucoin, and an allegation of prejudice in the investigation. For the latter point, Mr. McAurthur relied on the recent decision in Shreve v. Corporation of the City of Windsor (1993), (Ont. Bd. Inq.) unreported (Kerr).

At page 16 of the decision in Shreve, the Board noted that:

> "...it does not follow that delay can never be a ground for discontinuing human rights proceedings under the Ontario Code. The cases indicate that, while ordinarily delay is only taken into account in assessing the credibility of evidence or in fashioning the remedy, in a sufficiently serious case it may result in a dismissal of the proceedings.
>
> To justify dismissal, delay must result in serious prejudice to the ability of the Respondent to present its case.

> ....The mere fading of memory is not sufficient to constitute prejudice: Munsch v. York Condominium Corporation ...
>
> Once a party is aware of proceedings against it, there is some obligation to take steps to preserve evidence still available at that time....This would include making some reasonable attempt to record the recollections of witnesses to unrecorded events so that remaining memories can be refreshed."

Applying these tests to the circumstances of this case, it does not seem that the delay of 5 1/2 years has resulted in serious prejudice to the Respondent. Although the delay is regrettable, it is by no means unusual. With respect to counsel's submission that the transient nature of the tenancies in the apartment building in question contributed to the difficulty of the Respondent in locating witnesses after this passage of time, it is clear that the Respondent had the opportunity at the time it received the Complaint to ascertain which tenants could become witnesses on its behalf. It was certainly in the possession of records which could give it this information at that time, and because it has the obligation to preserve its evidence, it is not sufficient for it to say 5 1/2 years later that it neglected to do so, and now it is too late, and that therefore the delay has caused serious prejudice.

Counsel for the Respondent Effort Trust argued that the delay caused further prejudice in that with the passage of time Mr. Aucoin's health had deteriorated to the point where he had not appeared to give evidence. Counsel argued that without Mr. Aucoin's evidence Effort Trust would be unable to fully answer the allegations contained in the Complaint, since Mr. Aucoin was the only person who could testify about the events which took place while he was superintendent of the apartment building of which Ms. Morrison was a tenant. At the time that this preliminary motion was argued, it appeared that Mr. Aucoin would be available to give evidence in September, and that this further delay would be insignificant. Because Effort Trust had been aware of Mr. Aucoin's failing health for over a year and had failed to take any steps to preserve his evidence in written form, and because it appeared that Mr. Aucoin would be available to testify in the fall in any event, I ruled that the Complaint would not be dismissed against the Respondent Effort Trust. The Respondent Effort Trust made no further motions to dismiss, in spite of Mr. Aucoin's subsequent death.

I would note that I was never presented with any evidence to substantiate the claim of prejudice in the investigation report, and so it could not justify a dismissal of the Complaint against

Effort Trust.

III. The Evidence

a) The Notices of Early Termination

Ms. Morrison lived at 518 Mohawk Road East, Hamilton, apartment 502 from December 1979, until March 1987. This building was managed by the Effort Trust Company who employed Tony Verrecchia as property manager for this and other buildings. A Mr. and Mrs. Gray were the superintendents of the building until 1984, when Mr. and Mrs. Romeo Aucoin took over as superintendents. Although Mrs. Aucoin was listed as the official employee of the Effort Trust Company, it was clear from the evidence of Tony Verrecchia, from the record of Mr. Aucoin's discussions with the investigating officer, from the evidence of Mrs. Ruth Weatherbee (General Manager of Effort Trust) and from some invoices signed by Mr. Aucoin that he at all times functioned as an employee and representative of Effort Trust in the discharge of the duties which he and his wife shared as superintendents of the building. For the purposes of the matters raised by the Complaint it is clear that Mr. Aucoin was an agent of Effort Trust in his duties as superintendent.

Ms. Morrison lived with her husband and some of their five children at 518 Mohawk Rd. East (some children having become old enough to live on their own) until some time in 1986 when Mr. Morrison left to return to Jamaica. Ms. Morrison and three of her children continued to live in the apartment until March 1987. Ms. Morrison and her family left the building to move into a subsidized town house for a number of reasons: increased space, cheaper rent, and according to Ms. Morrison, to escape the harassment of Mr. Aucoin.

Ms. Morrison alleges that during the time that Mr. Aucoin was superintendent, he discriminated against her and her children, and that he harassed her and her children because they were black and from Jamaica. As a result of this harassment and denial of her right to equal treatment with respect to occupancy of accommodation, she claims to have suffered the loss of her husband, and to have developed high blood pressure. She requests $5,000.00 in general damages, plus interest.

The record before me reveals that from 1979 until 1984, the Morrisons had received two Notices of Early Termination (NT). One was for non-payment of rent. One was because "your children have been running in the halls of the building causing excessive noise levels and damage". Both of these NT's were received while Mr. Morrison lived with the family, and it was Ms. Morrison's evidence that it was Mr. Morrison's responsibility to pay the rent. It was also her recollection that until Mr. Aucoin became

superintendent of the building, her family had had no problems. I find her recollection consistent with the fact that it was Mr. Morrison's responsibility to handle financial matters and that she did not necessarily have knowledge of the NT's at that time. The NT concerning the children did not allege serious behaviour which could not have been easily corrected by her husband. Therefore, her assertion that she had no trouble until Mr. Aucoin became superintendent is not inconsistent with the record of NT's, and does not undermine her credibility.

From 1984 (after the Aucoins became superintendents) until 1987, Ms. Morrison received 8 Notices of Termination. One of these was for non-payment of rent, one was for non-payment of a parking fee (both of these were handled by Mr. Morrison) and six were for the (alleged) behaviour of the Morrison children who by now were teenagers. Each of the post 1984 NT's were signed by Tony Verrecchia, and many were posted on the door of the Morrison apartment. It was Mr. Verrecchia's evidence that these notices were delivered in person if possible, but that if no one was home they were posted on the door of the apartment. Ms. Morrison testified that she found this very embarrassing.

It was Mr. Verrecchia's evidence that with the exception of an incident which he observed in October of 1986, he had no personal knowledge of any of the particulars set out in the Notices of Termination, and that he relied completely on his superintendent to supply him with the necessary information. It is clear therefore that although Mr. Verrecchia was responsible for issuing NT's, most were initiated at the suggestion of the superintendent, Mr. Aucoin. It was the policy of Effort Trust that after three Notices of Termination, Effort Trust would apply for an eviction order. The grounds for eviction were those set out in the Notices of Termination.

An application was made in November 1985 to terminate the Morrison tenancy under the Landlord and Tenant Act. Mr. Verrecchia swore an affidavit dated November 15, 1985, which stated:

> THAT THE TENANT'S children or their friends have been riding their bicycles and rollerskating inside the building, urinating and spitting in the hallways and elevators of the building, and vandalizing the backyard area and the parking lot and generally disturbing the quiet enjoyment of the other tenants.

It must be noted again that Mr. Verrecchia testified that he had no personal knowledge of any of these alleged behaviours of the Morrison children. As such, there was no one at the hearing who had observed any of the Morrison children doing any of these things. Mrs. Morrison testified that her children did not have

bikes at the times in question, and that as far as she had been able to ascertain, none of them had been guilty of these behaviours. To defend the application for an eviction order, Ms. Morrison retained Ms. Fatima Mohedeen, a staff lawyer at McQueston Community Legal Services in Hamilton.

Ms. Mohedeen testified that in her investigation she interviewed the Morrisons, the Morrison children, their friends, and two other tenants who lived on the same floor as the Morrisons. As a result of her investigations, she testified that she was confident that she could successfully defend the application, and that the Morrison children had been wrongly accused. When questioned about the state of the Morrison apartment with respect to dirt, Ms. Mohedeen replied that she "found it to be a pleasant home inside, that outside it was old and worn but there was no problem". This contradicts evidence by Mr. Verrecchia that several tenants had complained of the dirt around the Morrison apartment. I found Ms. Mohedeen to be a very credible witness with a good sense of judgment. I prefer her evidence over that of Mr. Verrecchia.

Ms. Mohedeen held discussions with Mr. Mark Scholes, counsel for Effort Trust. At the conclusion of these discussions, Effort Trust withdrew its application for an eviction order. Mr. Verrecchia testified that it was his understanding that the application had been withdrawn because the Morrison's had undertaken to control their children. Ms. Mohedeen testified that she thought that the application had been withdrawn because of the strength of their defense, and that she had never spoken to Ms. Morrison about giving such an undertaking to Effort Trust. The following is an excerpt from examination in chief:

Q. Did you ever agree to speak to the Morrisons about their children?
A. I do not recall that I did. If I did it was merely conciliatory because they withdrew the application.
Q. Did you speak to the Morrisons and relay the message?
A. I don't think so.

In the end, the evidence of Ms. Mohedeen, which I have no reason to disbelieve, strongly supports Ms. Morrison's contention that the Notices of Termination were not founded on facts, but were part of a pattern of harassment. Further support of this conclusion is found in the content of the Notice of Termination dated June 3, 1985. Under the "Particulars" section the Notice states: "See attached letter." The attached letter was a letter which Mr. Verrecchia testified was sent to all tenants of this building and other buildings managed by Effort Trust. The letter contained a list of complaints for behaviours and problems which were common to a number of apartment buildings. Mr. Verrecchia made no attempt to justify all of these as allegations against

the Morrison children, and admitted that his main concern was loitering. I am left with the impression that whenever something went wrong in the building, be it a very common or an unusual complaint, the Morrison children were among the first to be accused of the behaviour.

On June 3, 1986, Mr. Verrecchia accompanied Mr. Aucoin to Ms. Morrison's apartment to make a complaint about her sons riding their bikes in the hallway.There were skid marks on the carpet in the hallway on Ms. Morrison's floor. Ms. Morrison explained that these marks had been caused by the wheels of an ambulance stretcher, which had been brought in on a rainy day to assist an elderly woman who lived on the floor. Mr. Aucoin's response was to suggest that if it had not been her boys riding their bikes, then it had been their friends.(Resp. Stmt. item #17) Once again, even when offered an explanation, Mr. Aucoin refused the explanation and continued with the assertion that the Morrisons were responsible, whether themselves or indirectly through their friends.

Ms. Mohedeen also testified that Ms. Morrison had discussed with her that she felt that she was being harassed by Mr. Aucoin. It was Ms. Mohedeen's evidence that everyone hoped that once the Landlord and Tenant matter had been settled that things would quiet down. In June of 1986 Ms. Mohedeen was retained by Ms. Morrison to assist her in laying a charge of harassment against Mr. Aucoin under the Residential Tenancies Act, because Ms. Morrison felt that the harassment was continuing. Ms. Mohedeen left McQueston before the matter was concluded.

Mr. Verrecchia testified that on October 21, 1986, he was in the building and saw the Morrison children and some occupants of the apartment across the hall from them standing in the hallway and talking. The tenants of the second apartment, the Edwards family, were also black. Both families received Notices of Termination dated November 17, 1986 as a result of this incident. In cross-examination Ms. Scott asked Mr. Verrecchia "Is it fair to say that in your mind, that was really what the problem was, that they were hanging around?" Mr. Verrecchia replied "The biggest problem in the building, yes."(Vol.4 p. 139) Mr. Verrecchia also made it clear in his testimony, that the Morrison children were not permitted to wait in the lobby for their friends, or stand between the two front doors waiting. I also heard evidence that on occasions when it was raining, and the Morrison children were waiting for the bus (the bus stop had no shelter), they were asked to step outside by Mr. Aucoin. The children were also not permitted to play in the parking lot, or the back yard, and there were no bicycle racks where either tenants or their guests could leave their bicycles. In short, there was no place in or around this building where tenants' children were permitted to play or talk except in their own

apartments.

It appears from the number of NT's issued to the Morrison family that there was "zero tolerance" of any type of behaviour which could be construed as loitering. I will leave for the moment the question of whether this "zero tolerance" was racially motivated.

In spite of the number of NT's, and Effort Trust's policy of going to court for an eviction order after three, the Morrisons were never evicted, and the only action ever taken was that taken in 1985, which was discussed above. It appears that the reason for this was that Mr. Verrecchia considered the Morrisons to be good tenants, as he himself stated in evidence. When Ms. Morrison applied for a subsidized townhouse, Mr. Verrecchia gave her a good reference. When questioned about this, Mr. Verrecchia maintained that he had told the truth, and that since the main problem was loitering, which would not be a problem in a townhouse, he did not mention it in his reference. This evidence is inconsistent with the theory put forward by counsel for the Respondent Effort Trust that the Morrisons were issued these NT's because they were a problem as tenants, that is , they received these Notices because they deserved these Notices.

The Respondent also lead evidence of a number of white tenants who had received eviction notices over this time period, and who had eventually left the building. After reviewing this evidence, it is clear that these other tenants were guilty of behaviour far more serious than "hanging out", and that they had not received as many NT's as the Morrisons. In addition, these tenants were observed doing the things of which they were accused. For example, one was caught urinating in the elevator while drunk, another did not pay the rent, and another had loud parties and threw garbage and beer bottles off of the balcony.

It appears to me from this evidence, that the Morrisons received unusually harsh treatment for the relatively minor problem of "hanging out".

b) Evidence of racial slurs

Ms. Morrison testified about several incidents when she alleges that Mr. Aucoin made racial comments to her. I will focus on only three of these incidents. The first is alleged to have occurred in August 1985, while Ms. Morrison was waiting in the lobby for her son to return from the pharmacy with some medication which she required. The second is alleged to have occurred in May 1986 when Ms. Morrison and Mr. Aucoin met in the hallway outside her apartment. Ms. Morrison describes these incidents in cross-examination, as follows:

Q. No, what was it that Mr. Aucoin said to you when you were waiting for your medication?

A. Oh, "Don't want any "F-ing" nigger hanging out in the lobby".

Q. Okay, I will leave this in a minute, but do you recall any others specifically that you told Mr. Verrecchia about? Comments?

A. Yes. Yes, I reported to Mr. Verrecchia and the other one, racial slur, "You should go back where you "f-ing" nigger -- go back where you're from." (Vol.1 p. 116)

Mr. Verrecchia testified that Ms. Morrison had complained to him of these incidents. He specifically recalled that she had brought these to his attention in November of 1986, when Mr. Verrecchia accompanied Mr. Aucoin to Ms. Morrison's apartment to serve her with a Notice of Early Termination:

Q. Just leaving this incident to the side for a moment, do you recall Mrs. Morrison ever speaking to you -- complaining to you about racial comments made by Mr. Aucoin?

A. The particular time that I do recall it was this day that this notice was served.

Q. What did Mrs. Morrison tell you, to the best of your recollection?

A. To the best of my recollection, Mrs. Morrison had disputed the point that Romeo Aucoin had used words indicating that they were negro or that they were ---

Q. Mr. Verrecchia, let me just stop you for a second. We have all got a record in front of us.

A. Okay.

Q. We can be frank.

A. All right. That they were "fucking niggers", and that she also disputed the point that in a number of occasions that he had mentioned that they should go back where they came from. (Vol. 4 p. 60)

The fact that Ms. Morrison complained to Mr. Verrecchia about these incidents makes her evidence credible on these points.

The third incident concerns a situation where Ms. Morrison and the neighbour who lived directly across the hall from her, Sandra Edwards, were each in the doorway to their own apartment, talking, when Mr. Aucoin came onto the floor from the elevator and observed them. Paragraph 21 of the Complaint alleges that in "February, 1987, I was speaking to one of my neighbours in the hallway outside my apartment. When Mr. Aucoin saw us, he told us, "Get out of the hallway!" This neighbour is black."

Ms. Morrison testified that when Mr. Aucoin saw them he told them to get out of the hallway and said "This neighbourhood is black.". Sandra Edwards described the incident as follows in

cross-examination:

> Q.Ms. Edwards, you described an incident when Mr. Aucoin came down the hall and I believe you said that you were speaking with Mrs. Morrison?
>
> A. Yes.
>
> Q. Was there anyone else present at all, or just you and Mrs. Morrison?
>
> A. Just the two of us. Just the two of us.
>
> Q. You indicated that Mr. Aucoin was obviously I think yelling?
>
> A. Yes, he just walk out of the elevator and saw us standing there and he said that this is not -- something like "This is not a black hang-out," something like that. And I just says, "Romeo, why don't you just keep walking."

Counsel for the Respondent Effort Trust made much of the fact that the Complaint did not include "This neighbour is black" in the comments attributed to Mr. Aucoin. He suggested that Ms. Morrison's evidence was fabricated to turn that paragraph in the Complaint into a racial slur. I do not accept this interpretation of the Complaint and Ms. Morrison's testimony. Ms. Morrison's evidence is corroborated by Ms. Edwards' testimony. Ms. Edwards recollects different words, but the substance of the two recollections is the same. "Neighbourhood" and "hangout" have a very similar meaning in the present context. I think it is far more likely that some mistake was made in drafting the Complaint, than that either Ms. Morrison or Ms. Edwards is lying about the incident.

Counsel for Effort Trust also suggested that Ms. Morrison and Ms. Edwards had collaborated in making up the story. I do not accept this. Ms. Edwards testified that it had been over two years since she had last communicated with Ms. Morrison. I find Ms. Edwards to be a credible witness.

There is no doubt that Ms. Morrison and Ms. Edwards had a conversation in the hallway outside their apartments that day. The only dispute is as to whether they were standing up or sitting down, and as to what Mr. Aucoin said. I accept the evidence of Ms. Morrison and Ms. Edwards that what Mr. Aucoin said constituted a racial slur.

Item #21 of the Respondent's Statement (Ex. #15) states:

> They were not just standing talking in the hallway but sitting - Mr. Aucoin passed by saying "this doesn't look very nice" - kept going on his rounds through the building. It just happens that all persons were black.

In his interview with the investigator, Mr. Aucoin made the

following comments about this incident:

> Q. Paragraph 21 says you ordered Mrs. Morrison's black neighbour out of the hallway too.
> A. Yes. That was the tenant from across the hallway, in 505.That's true. He as black. There were two people in the hallway sitting on the floor. There was the girl from 505 and the old lady from 502. Both doors were open and I told them to get inside. They didn't move, they just ignored me.
> Q. Isn't that ok? What's wrong with talking in the hallway Arn't you picking on these tenants?
> A. Hanging is different than talking. I would treat whites just the same. Sitting on the floor in the hallways with doors open is different than just standing there, talking. That's hanging. This creates a noise and a disturbance for neighbours.

It is clear that Mr. Aucoin was concerned with what he considered to be "hanging out" as opposed to talking. Although I do not see the distinction in this situation, Mr. Aucoin's comments lend credibility to Sandra Edwards' testimony that he said "This is not a black hangout".

I find that the evidence of these alleged racial slurs is highly credible, and I find on the balance of probabilities that these incidents took place as Ms. Morrison alleges.

c) Issues of credibility

Ms. Morrison made a number of allegations about the conduct or language of Mr. Aucoin which could not be corroborated by anyone, simply because no third person was present at the time to observe them. Because Mr. Aucoin could not appear to testify in his own defence, I will make no findings on these allegations. My findings will rely on the evidence reviewed above, which has been corroborated either by a written record, or by the testimony of a third person, or by Ms. Morrison having complained of the conduct to a third person.

Ms. Morrison also complained about a number of repairs which she said had not been completed in her apartment. The Respondent Effort Trust introduced a number of invoices for work which was done in Ms. Morrison's apartment during the time she lived there. Nothing turns on whether repairs were made or not, except insofar as the evidence of repairs which were done undermines Ms. Morrison's credibility as a witness. I do not find that the evidence undermines Ms. Morrison's credibility as a witness with respect to the evidence reviewed above concerning the Notices of Early Termination, and the three incidents of racial slurs. As noted above, this evidence was corroborated.

It is clear that Ms. Morrison and Mr. Aucoin did not enjoy the most cordial of relationships. It is possible that repairs which were of great concern to Ms. Morrison may not have been done as soon as she would have liked them to be done. It is not inconceivable that the delay could have been interpreted in light of her poor relationship with Mr. Aucoin, whatever the actual reason for the delay. It is also possible that certain repairs were completed, while others were not. Again, nothing turns on this point.

Ms. Morrison's youngest child, John Morrison, also testified before this Board. He made several serious allegations against Mr. Aucoin, and it was clear from his testimony that, at best, Mr. Aucoin had been very irritated by John Morrison when he was a teenager living in the apartment building during the time Mr. Aucoin was superintendent. Because of several inconsistencies between the information John gave to the investigating officer, and the testimony he gave during the hearing, I do not find John Morrison to be a credible witness. The evidence of John Morrison will therefore be disregarded.

d) Further evidence of Sandra Edwards

Ms. Edwards gave evidence which tends to support Ms. Morrison's allegations that Mr. Aucoin frequently accused her children of wrongdoing:

> Q. How did Romeo Aucoin treat the Morrison children? Did you ever see that?
> A. Yes I did.
> Q. What did you see?
> A. Well, we lived right in front of the Morrisons. Every time there would be a knock or something out there it would sound like its your door or so, and whenever we hear a knock we'd look out the window. He was always coming up because we take it as joke now, my family, because he would be always going to the door saying those kids did things.
>
> Sometimes they're not even there. Like -- like -- okay, like John now -- John's -- like he doesn't talk very much, he's very, very quiet. So he doesn't talk to everybody around the building where -- not John, Ian. Where John would talk to everybody, but Ian was really quiet. Colin wasn't there a lot because he worked.
>
> Whenever something, like I said, if it's not our door it's the Morrison's door and we take it as a joke now, listening to every time he comes up to accuse you of doing this and that. (Vol.2 p. 61-62)

It is clear from the tone of Ms. Edwards' testimony, that she did not think that the Morrison children were always justly accused of misbehaviour by Mr. Aucoin.

Ms. Edwards described another incident which lends credibility to the allegation that Mr. Aucoin's treatment of black tenants was racially motivated:

> Q. Can you tell us about the second time that you have had a problem with Mr. Aucoin?
> A. Yes, I took my son for a walk. So I was coming through the front door, he was coming from his apartment, because his apartment's down the other -- like by the side door, and he was coming from down there.
>
> When I opened the second door to come in, push my key in to come up the stairs he told me that I couldn't come up the stairs at all with the baby. That I got to go back out and go around the back door, and I says "I'm not going to the back door."
>
> Then he says "You got to go outside and go to the back door," and I says to him, "No, that's abolished." I said, "That's no longer exist, we don't use a back door anymore." And then I didn't. I went right up the stairs and walked right past him with my baby stroller.
> Q. Where were you -- at the time, where were you trying to enter the apartment from?
> A. To go to the elevator.
> Q. The elevator in the lobby?
> A. Yes, from the front door.

I have found that Sandra Edwards is a credible witness. It is difficult to believe that Mr. Aucoin would tell a mother with a baby in a stroller who had just made it through two doors, to leave and repeat the procedure at the side door so that she could go down some steps to the basement elevator (as opposed to up some steps to the lobby elevator) <u>unless</u> he was racially motivated.

Mr. Verrecchia testified that persons with wheeled vehicles were not permitted to enter the building via the lobby, but rather were required to enter through the side door, to use the basement elevator. The reason for this was to protect the panelling and floor of the lobby from damage caused by bicycles, shopping carts etc. . Mr. Verrecchia also mentioned baby buggies, but from my observation of his tone of voice it was mentioned as more of an after thought. At the time I suspected that he had Sandra Edwards' testimony in mind. The policy as far as bicycles and other large dark wheeled vehicles makes good sense. The policy as far as baby strollers makes no sense, and , if it existed, I find it difficult to believe that it would have been widely enforced.

IV. Was Mr. Aucoin's treatment of the Morrison family racially motivated?

The strongest evidence that Mr. Aucoin's treatment of the Morrison family was racially motivated is the evidence given by Ms. Morrison and Ms. Edwards about the "black hangout" or "black neighbourhood" incident. I accept their evidence that this incident occurred as they described it. Nevertheless, because Mr. Aucoin was unable to be present to defend himself, I am not prepared to accept this as direct evidence that the pattern of Mr. Aucoin's conduct, including the allegations against the children and the Notices of Early Termination, were racially motivated. The issue is whether the evidence reviewed in this judgment constitutes circumstantial evidence that the conduct was racially motivated.

The following is an excerpt from Proving Discrimination in Canada (B. Vizkelety) (Carswell, 1987) at p. 142:

> The appropriate test in matters involving circumstantial evidence, which should be consistent with this [civil] standard, may therefore be formulated in this manner: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

Is it more probable, on all of the evidence, that Mr. Aucoin was racially motivated than that he was not?

Counsel for the Respondent Effort Trust put forward the hypotheses that, with respect to John Morrison in particular, because Ms. Morrison worked shifts, and her husband no longer lived with the family, the children (teenagers) were often left unsupervised after school for hours at a time. With energetic teenagers and their friends, who had nothing to do, were unsupervised, and had no real place to "hang out", it is understandable that they would get into mischief in and around the building. Add to this an "old fastidious superintendent", and there were bound to be conflicts, misunderstandings, and perhaps a few blowups where people lost their temper.

I have some sympathy for this hypotheses. From my observation of John Morrison, it is clear that he was and is a very energetic young man, with the type of easy-going attitude that could seriously irritate an "old fastidious superintendent" (to quote counsel for the Respondent). This does not however, excuse Mr. Aucoin from making racial slurs.

The law is clear that "racial harassment is present when one person verbally insults another person on the basis of his race, colour, ancestry and place of origin, irrespective of the

underlying events that trigger the outburst". Persaud v. Consumers Distributing Ltd. 14 C.H.R.R. D/23 at para 32. p. D/27. (underlining mine)

In my opinion, given the evidence reviewed above, it is more probable that Mr. Aucoin's treatment of the Morrison family was racially motivated, than that he was simply giving a mischievous teenager the treatment he deserved.

V. Did Mr. Aucoin's treatment of the Morrison family constitute harassment contrary to s.2(2) of the Code?

Section 2(2) of the Code provides:

> (2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour ethnic origin...

Mr. Aucoin was an occupant of the same building as Ms. Morrison, and, in his capacity with his wife as superintendent of the building, was also acting as an agent of the landlord. Mr. Verrecchia's evidence was clear that he relied on his superintendents to manage the day to day affairs of the apartment building. They were his 'eyes, ears and feet' while he was not physically present in the building. They were also his primary source of information about the conduct of tenants, including any recommendations for Notices of Early Termination, and about the need for repairs in the building. As such, the superintendent was an agent of the landlord who also exercised type of management function in running the building.

Harassment is defined in s. 10 (1) of the Code as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome". Mr. Aucoin's conduct in his accusation of the Morrison children of wrongdoing and the issuance of the Notices of Early Termination, combined with his racial comments were clearly vexatious to Ms. Morrison. She suffered from high blood pressure as a result, and it became a major source of conflict with her husband. Ms. Morrison also complained directly to Mr. Aucoin and Mr. Verrecchia about the comments and conduct, and in June of 1986 laid a private information against Mr. Aucoin for harassment. If it was not known to Mr. Aucoin (and Mr. Verrecchia) that this comment and conduct was unwelcome, it certainly ought to have been known. I must conclude therefore, that Mr. Aucoin violated Ms. Morrison's right to be free from harassment, contrary to s. 2(2) of the Code.

VI Liability for the harassment of Ms. Morrison

The liability of employers for harassment by their employees is set out in Wei Fu v. Ontario Government Protection Service 6 C.H.R.R. D/2797 at p. D/2801:

> Where the employer is a corporate entity, and an employee is in contravention of the Code, and that employee is part of the 'directing mind' of the corporation, then the employer corporation is itself personally in contravention. The act of the employee becomes the act of the corporate entity itself, in accordance with the organic theory of corporate responsibility. ...
>
> The difficulty in applying the organic theory of corporate responsibility...comes in the factual determination as to whether the employee in question is part of the 'directing mind'. ...Generally speaking, whenever an employee provides some function of management, he is then part of the 'directing mind'. Once an employee is part of the directing mind, and the contravention of the Code comes in performing his corporate function, the corporation is itself also personally in breach of the Code.

Was Mr. Aucoin part of the 'directing mind' of Effort Trust, insofar as his treatment of the Morrison family is concerned? In considering which employees are part of the 'directing mind' the Board of Inquiry in Gosh v. Domglass Inc. (1992) (Hubbard) (unreported) stated at p.22 that:

> Having regard to the nature and purpose of human rights legislation, I should think it sufficient in principle that the harassing employee was in a position to make decisions on behalf of the company seriously affecting the victim.

Mr. Aucoin was in the position to make decisions which seriously affected Ms. Morrison. He could recommend the issuance of Notices of Termination, decide whether repairs would be carried out in the apartment, and generally determine the type of physical environment in which tenants of the building would live. By his conduct and comment, he could also influence the type of 'atmosphere' which prevailed in the public areas of the building. In addition to this, as noted above, Mr. Aucoin exercised a type of management function in running the daily affairs of the apartment building. For these reasons, I find that Mr. Aucoin, as superintendent of the apartment building, was part of the directing mind of Effort Trust. As a result, Effort Trust is liable for the harassment of Ms. Morrison.

VII The Remedy

Ms. Morrison is seeking $5,000.00 in general damages under s. 41(1)(b) of the Code plus interest for her mental anguish and her loss of the right to be free from discrimination. She also testified that she suffers from high blood pressure, and that her husband left the family as a result of the harassment by Mr. Aucoin. She claims no special damages. The Commission is not requesting a public interest remedy, since the recently implemented policies of Effort Trust should adequately address any potential future problems.

Section 41(1)(b) provides that the board may, by order,

> direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

Mr. Aucoin's conduct and comments were engaged in wilfully. I also find that Mr. Verrecchia, who signed the Notices of Early Termination and who was advised by Ms. Morrison of Mr. Aucoin's racial comments, did nothing to prevent Mr. Aucoin from continuing in his conduct. Although he asked the Aucoins whether "it was true", upon receiving a denial he did not pursue the matter any further. His failure to take any further steps to remedy the situation was wilful,and reckless within the meaning of s. 41 (1) (b) of the Code.

In this case, the nature of the harassment was verbal and written, and continued from 1984 to 1987 when the Morrisons moved. Ms. Morrison retained a lawyer twice to deal with matters related to the harassment, and gave evidence of having developed high blood pressure as a result. Although she offered no medical evidence to support her claim, I accept her evidence on this point.

Ms. Morrison also claimed that her marriage broke up as a result of Mr. Aucoin's harassment. Mr. Morrison wished to return to Jamaica to escape the harassment, while Ms. Morrison preferred to endure it for the sake of having the children receive a good education in Ontario. Although I have no doubt that this became a major conflict in the marriage, I am not convinced that the harassment by itself caused the marriage breakdown.

Having regard to these factors, I have determined that an award of $3,500.00 plus interest calculated in accordance with the Courts of Justice Act, at 10% from December 17, 1987 until October 26, 1993, would be appropriate in this case, plus

interest on these amounts, calculated in accordance with the Courts of Justice Act, from the date of this order until the date of payment.

I have also determined that although it is in the public interest that the conduct and comments of Mr. Aucoin be assessed in light of the standards imposed under the Code on superintendents of apartment buildings, the public interest does not demand that the estate of the late Mr. Aucoin be liable for the damages which have been awarded to Ms. Morrison. As a result, I hold that the Effort Trust Company is solely liable for the damages awarded to Ms. Morrison.

VII The Order

This Board of Inquiry, having found the Respondent Mr. Aucoin and the Effort Trust Company to have committed breaches of section 2(2) of the Code hereby orders the following:

1. The Respondent Effort Trust is liable to pay forthwith to the Complainant as follows:

    a) the sum of $3,500.00 as general damages;

    b) interest at 10% calculated in accordance with the Courts of Justice Act on the amount set out above, from December 17, 1987 until October 26, 1993;

    c) interest calculated in accordance with the Courts of Justice Act on the amounts set out above from the date of this Order until the date of payment.

This Board of Inquiry shall retain jurisdiction for the purpose of resolving any difficulties the parties might experience in implementing this Order.

Dated at London, this 1st day of December 1993.

Kathy Tomaszewski

Katherine Tomaszewski
Chair, Board of Inquiry